



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2004

Ms. Sara Hardner Leon
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703-4703

OR2004-0485

Dear Ms. Leon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194847.

The Del Valle Independent School District (the "district"), which you represent, received a request for information concerning certain grievances filed with the district.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.²

Initially, we must address the district's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney

¹The requestor also seeks several additional categories of information. You indicate that the district is providing this additional information to the requestor.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the district received the requestor's first written request for information on October 10, 2003. You state that the district received a second, expanded request for information on November 5, 2003. You explain that the district requested clarification of these requests, but you have not provided this office with any information about the timing or nature of the district's requests for clarification. *See* Open Records Decision No. 663 at 5 (1999) (time used in clarifying scope of request does not count as part of governmental body's statutory allotment of ten business days to request an attorney general decision under Gov't Code § 552.301). You also state that your request for a decision is limited to documents requested on November 5, 2003, "which were not specifically requested in prior requests." The submitted sample information includes a Level I grievance and response. We agree that grievance responses were not requested until November 5, 2003. However, based on the information you have provided, we find that the grievances themselves are responsive to the October 10, 2003, request for "[a]ll Level I and Level II Grievances filed between November 2001 and October 2003, copies of which were maintained in the Human Resources Office." Therefore, section 552.301 required the district to request a decision regarding the grievances within 10 business days of the October 10 request. Because you did not request a decision until November 7, 2003, the grievances are presumed to be public information. Gov't Code § 552.302.

Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Although you assert that the grievances are excepted from disclosure under section 552.103, this is a discretionary exception and is not a compelling reason to overcome the presumption that the grievances are public. *See* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the grievances may not be withheld under section 552.103 of the Government Code.

Because grievance responses were requested for the first time on November 5, 2003, we find that the district did not violate the ten-day deadline in section 552.301 with respect to this information. Thus, we will consider your section 552.103 claim for the grievance responses.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the requestor has requested a hearing regarding her termination before an independent hearing examiner under Chapter 21 of the Education Code. According to section 21.256(e) of the Education Code, hearings requested under section 21.253 "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." This section also specifically affords the person making the appeal the right to be represented by a representative of his/her own choice, to hear evidence on which the charge is based, to cross-examine each adverse witness, and to present evidence. It also states that the Texas Rules of Civil Evidence apply at the hearing. *See* Educ. Code § 21.256. Accordingly, we find that a hearing under section 21.253 of the Education Code constitutes litigation for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor), 301 (1982) (concluding that litigation includes a contested case before an administrative agency). You further inform us that an examiner was appointed on October 28, 2003 and a hearing date has been set. Therefore, we conclude that

litigation was pending on the date that the district received the request for the grievance responses. We also conclude upon review of the submitted information and your arguments that the grievance responses relate to the pending litigation. Therefore, the district may withhold the grievance responses under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, you must release the grievances. The grievance responses may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 194847

Enc. Submitted documents

c: Dr. Elsa Villegas
2124 Ravenscroft Drive
Austin, Texas 78748
(w/o enclosures)